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Editors' Introduction

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This special issue of *Acta Juridica* is a culmination of a series of events to honour former Deputy Chief Justice, Dikgang Moseneke, including a seminar at the University of the Witwatersrand. A well-attended symposium was held at the University of Cape Town on 7 December 2016, with thoughtful presentations and engaged dialogue in honour of a great jurisprudential mind and judicial leader. Papers presented at the symposium appear in this volume, while additional papers were included to add to the richness of the tribute which we pay to Justice Moseneke upon his retirement from the Bench.

The articles in this volume are arranged into three main thematic sections: separation of powers, equality and economic justice. In addition there are four personal reflections from colleagues, friends and a former Constitutional Court clerk. These reflections remind us of the human being behind the distinguished legal stature and role played by Justice Moseneke.

Judicial engagement and the separation of powers occupy the first thematic section. The doctrine of separation of powers received considerable attention from Justice Moseneke. As illustrative, in *National Treasury and Others v Opposition to Urban Tolling Alliance and Others*[1] Moseneke DCJ warned that the primary responsibility of a court is not to decide questions reserved for or which fall within the domain of the other branches of the state. In respect of an application for an interim interdict to prohibit an organ of state from proceeding with an e-tolling system for public roads, he noted:

In a dispute as the present one, this does not mean that an organ of state is immunised from judicial review only on account of separation of powers. The exercise of all public power is subject to constitutional control. In an appropriate case an interdict may be granted against it. For instance, if the review court in due course were to find that SANRAL acted outside the law then it is entitled to grant effective interdictory relief. That would be so because the decision of SANRAL would in effect be contrary to the law and thus void.

When it evaluates where the balance of convenience rests, a court must recognise that it is invited to restrain the exercise of statutory power within the exclusive terrain of the executive or legislative branches of government. It must assess carefully how and to what extent its interdict will disrupt executive or legislative functions conferred by the law and thus whether its restraining order will implicate the tenet of division of

[1] 2012 (6) SA 223 (CC).

powers. While a court has the power to grant a restraining order of that kind, it does not readily do so, except when a proper and strong case has been made out for the relief and, even so, only in the dearest of cases.[2]

As these *dicta* reveal, Justice Moseneke was particularly concerned with finding the location of the boundary between judicial intervention and executive policy-making. These *dicta* provide a foundation for the first two papers devoted to exploring this theme. Heinz Klug examines Justice Moseneke's jurisprudence in terms of the interaction of different spheres of authority. Klug argues that Justice Moseneke showed sensitivity to the need for judicial restraint, of courts invading other domains of state authority, while still remaining alert to the need for institutional integrity at all levels of governance. Klug points to Justice Moseneke's concern for the development of a particular South African doctrine of separation of powers that is sensitive to a democratic system of governance.

Klug shows how Justice Moseneke was concerned that a South African doctrine of separation of powers had to recognise the will of the people as expressed legislatively. Justice Moseneke was also mindful that effective government can respond substantively to the deprivation of the poor and marginalised while simultaneously ensuring the public power so exercised was under constitutional control. With this balanced approach, Justice Moseneke ensures that the judiciary protects itself against criticism of overreach in exercising its authority, while recognising that the legislature and the executive have space to fulfil their own designated constitutional roles. Klug argues that, in this way, Justice Moseneke has made 'a singularly important contribution' to the development of a distinctly South African conception of separation of powers.

Peter Danchin critically explores the questions of constitutional authority and normativity, and suggests that a deep and perilous paradox arises in their interrelation in any constitutional order. Danchin suggests that the enthusiastic embrace of a thick model of constitutional review is predicated on an incorrect premise. Thus, within the South African context, the legal evil of Apartheid was not parliamentary supremacy *per se* but a violation of its core premises: democratic self-government and the key principles of representation and political equality. Likewise, the advocates of strong judicial review have paid insufficient attention to the potential erosion of self-government, the idea of popular sovereignty and the danger of judicial displacement thereof. Thus, to justify their relationship to popular sovereignty, judges will increasingly have to resort to formalism and originalism to protect against a legitimacy deficit. This legitimacy deficit is perceived and expressed as unelected judges fashion-

[2] See n 1 at paras 64–66.

ing the details of policy, rather than deferring to democratically elected institutions.

This is a provocative contribution to the debate about Justice Moseneke's deep concern to establish viable boundaries between the judiciary and the other arms of government, particularly when viewed against Klug's careful embrace of Justice Moseneke's doctrine of separation of powers.

Cathleen Powell employs the ground-breaking case of *Glenister v President of the Republic of South Africa and Others*[3] as a means of advancing the notion of constitutional democracy under the rule of law. Powell's argument, drawing on the earlier work of Etienne Mureinik and Lon Fuller, emphasises the importance of the legislature and the executive in justifying the exercise of their power through the principles of legality. Within this framework, the concept of inter-branch dialogue between the judiciary and the other two arms of the state becomes central to the constitutional model; that is the executive, in particular, is required to explain why a specific exercise of power complies with the values of the rule of law. This process of justification takes place in an exchange with the judiciary. This dialogic process, in turn, promotes a culture of justification of the exercise of public power. A decision of the majority in *Glenister,* co-written by Justice Moseneke, illustrates how courts can examine the design of a key institution, such as the anti-corruption unit called the Hawks, to ensure principles of transparency, accountability and adherence to legality are central to the exercise of the powers of the particular institution. Read thus, this paper offers a counter-narrative to that developed by Danchin.

Ntombizozuko Dyani-Mhango and Mtende Mhango advance an argument for the creation of a South African political question doctrine which is borne out of a separation of powers principle. Using Justice Moseneke's majority opinion in *International Trade Administration Commission v SCAW South Africa (Pty) Ltd*[4] and *National Treasury and Others v Opposition to Urban Tolling Alliance and Others*,[5] they argue that while Justice Moseneke's jurisprudence recognises the limits of judicial power, it fails to define the scope and contours of judicial authority.

The key point made here is that Justice Moseneke has failed to develop, as presumably is the case with the rest of the Court, a coherent political question doctrine which is essential to the principle of separation of powers. The authors contend that the political question doctrine is not one that requires courts to refrain from deciding the question that has political implications, but rather applies to political questions that are

[3] 2011 (3) SA 347 (CC).
[4] 2012 (4) SA 618 (CC).
[5] 2012 (6) SA 223 (CC).

either delegated to decision by the political branches of government for resolution, or those where there is an absence of a judicial norm or standard to resolve the problem.

Dyani-Mhango and Mhango's main complaint seems to be that judicial pronouncements regarding the separation of powers doctrine have left out crucial considerations as to how the courts should observe the limits of their own power. Whether such precision of implementation of the doctrine can be offered by the adoption of the US political question doctrine is debatable and is certainly questioned by Klug in his chapter. But what is interesting with regard to these insights is the failure of the other institutions which exist to promote accountability, namely the Hawks, the National Prosecuting Authority, the South African Police Service, and Parliament with its residual powers, to hold the executive accountable.

The second thematic area which draws on the judgment of Justice Moseneke concerns the vindication of equality principles enshrined in the Constitution, which have been described in this volume as 'transformation, equality and indigeneity'. Chuma Himonga commences with the view that the Constitutional Court has endorsed legal pluralism by affording equal status to indigenous law and common law, thereby contributing to the decolonisation of the law.

Himonga then provides a useful analysis by which to test the decolonisation of law, namely the inclusion of all legal systems in the national legal system. She is concerned with the existence of the conditions necessary for the application and development of all legal systems which comprise the totality of the national legal system and particularly the attention which must be given to the determination of authenticity of unwritten indigenous systems of law applied by the courts. Although she finds that a number of judgments of the Constitutional Court have contributed to the decolonisation of law, there are pronouncements of the Court which have cast a shadow over the relationship between indigenous law and the common law by the programme given to common law. Developing upon this theme, Himonga raises the question as to how customary law is to be part of the 'amalgam of law for a future South Africa'.[6] It is the challenge to ensure that customary law is not dominated by the common law, as was the case under the colonial legal system, which lies at the heart of this contribution.

By contrast, Sandra Fredman steers the issue of vulnerability in a different direction to that of previously disadvantaged persons and the hierarchical nature of affirmative action jurisprudence. Fredman is particularly concerned with the relationship between race, class, representa-

[6] *Alexkor Ltd and Another v Richtersveld Community and Others* 2004 (5) SA 460 (CC) at para 51.

tion and the principle of substantive equality. She poses the following key question: what role does affirmative action play in cases where socio-economic disadvantage is no longer an issue? Developing upon Justice Moseneke's conception of the restitutionary aim of substantive equality as set out, in particular, in *South African Police Service v Solidarity obo Barnard*,[7] Fredman extends the conversation with regard to affirmative action beyond that of socio-economic disadvantage to the addressing of on-going stereotyping and prejudice which, in turn, must facilitate voice, participation and structural change. In this way, she contends that the jurisprudence developed by Justice Moseneke can be expanded to ensure that all members of a status class are not treated as identically positioned economically and socially, a consideration which can reinforce internal differences within groups and further marginalise the weakest in the group. Accordingly Fredman argues that affirmative action, while not ignoring socio-economic disadvantage, should avoid collapsing status into class. In this way, the promotion of a jurisprudence of substantive equality can be based upon a more nuanced analysis of the power relations and the different aspects of an individual's social position.

Fredman, however, reminds us that affirmative action must be seen as part of a broad-based radical strategy of redistribution and restitution. Coming to this conclusion, she recalls Justice Moseneke's comment in *South African Police Service v Solidarity obo Barnard*:[8] 'We must remind ourselves that restitution measures, important as they are, cannot do all the work to advance social equity.'

In a similar theme, Lauren Kohn and Raisa Cachalia critically reflect on the decision in *Minister of Justice and Constitutional Development and Others v South African Restructuring and Insolvency Practitioners Association and Others*.[9] They show how the s 9(2) restitutionary measures, laid out earlier by Justice Moseneke in *Minister of Finance v Van Heerden*,[10] influenced the SARIPA judgment. This is so in particular regarding the negotiation to go beyond a mechanical system for historical restitution, to an equality jurisprudence that addresses the legacy of the racism of the past as it forges a path towards a non-racist future.

In her contribution, Tendayi Achiume juxtaposes Justice Moseneke's judgment in *Barnard* with the decision of the Southern African Development Community (SADC) Tribunal in *Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe*.[11] Situating *Barnard* in the anti-subordination tradition, she uses the comparison between *Barnard* and *Campbell* to

[7] 2014 (6) SA 123 (CC).
[8] See n 7 at para 33.
[9] 2017 (3) SA 95 (SCA).
[10] 2004 (6) SA 121 (CC).
[11] [2008] SADCT 2 (28 November 2008).

underscore the vital role of judges in the quest for substantive racial equality in southern Africa. Describing Justice Moseneke's jurisprudential approach as transformative, Achiume sees his vision and commitment as vital to attaining the goals of substantive racial equality. She laments the missed opportunity on the part of the SADC Tribunal in *Campbell* for forging a similar path as that shaped by Justice Moseneke. She particularly regrets the rejection of historical racial discrimination in the *Campbell* judgment as well as its lack of 'doctrinal nuance'.

Economic justice is the final thematic theme in this volume. Judge Fayeeza Kathree-Setiloane invites the reader to appreciate Justice Moseneke's unique insight and vision of the transformative project of the Constitution. She observes that the constitutional project has failed to transform the socio-economic plight of the majority of South Africans; a failure which is not due to an inadequate Constitution, but rather to a failure of political will.

In her contribution Erika George raises the interesting question of the relationship between economic change and the rule of law in effecting such change. She argues that a fitting tribute to Justice Moseneke's commitment to the belief that all people are entitled to live in a just society where their dignity and self-worth are respected would be an inclusive vision of economic development and public participation in economic policy-making. She shows luminously how in a range of areas from equality to eviction, and thus the provision of alternative accommodation to the law of contract, Justice Moseneke has sought to effect substantive transformation upon the legal system in order to achieve economic justice for all.

Erika George draws attention to Justice Moseneke's calls to engage with international economic law in a manner that brings about economic justice for South Africans. George accepts Justice Moseneke's invitation to imagine a transformative South African constitutionalism which contains an inclusive vision of economic development and public participation in economic policy-making. To this end she examines a series of problems relating to bilateral investment treaties and the manner in which these agreements provide a trump card for investors over the rights contained in the South African Constitution. In turn this leads George to a discussion of the development of a set of obligations which should be imposed upon global business enterprises not only to provide redress for human rights abuses occasioned by their business operations but also to ensure the promotion of economic development. George finds precedent in the litigation between the *Pharmaceutical Manufacturers Association of South Africa*[12] and the *Treatment Action Campaign*,[13] concerning the former's

[12] 2000 (2) SA 674 (CC).

argument that the South African government's legislative programme to protect the health of the public by making essential medicines more affordable was in breach of the government's TRIPS obligation. She considers this to be an exemplar of the manner in which law can be used in a more global context for the promotion of economic development and the protection against human rights abuses by powerful private interests, being multinational corporations. This article raises fascinating questions about the role of the Constitution in the shaping of the content of economic policy for the promotion of developmental objectives.

Jaco Barnard-Naudé examines the critical role played by Justice Moseneke in the emergence of good faith as a master signifier for the general principles of South African contract law. Borrowing from the work of Jacques Lacan, Barnard-Naudé argues that contract law in South Africa is in the process of significant change away from traditional signifiers such as will theory reliance, misrepresentation, breach, duress and public policy, all of which have fallen under a judicial master signifier of freedom of contract, or *pacta sunt servanda*. It is through this master signifier that the individualistic legal subject of the law of contract is juridically represented. Barnard-Naudé shows how Justice Moseneke's minority judgment in *Barkhuizen v Napier*,[14] in particular, acknowledges the role for good faith in the law of contract so that this judgment represents the planting of the roots for an emergent new master signifier in our law of contract. In particular, Barnard-Naudé finds the following passage in Justice Moseneke's judgment in *Barkhuizen* to be significant:

To defeat a complaint that a contractual term offends public policy by holding that the complainant has not shown individual unfairness is in effect to extol the laissez faire notions of freedom of contract at the expense of public notions of reasonableness and fairness.[15]

This constitutes a distinctive judicial displacement of freedom of contract with principles of good faith and fairness. Viewed within this prism, the jurisprudence of Justice Moseneke poses a fundamental challenge to the manner in which the law of contract is adjudicated upon, analysed in the traditional textbooks and taught at universities.

Barnard-Naudé contends therefore that Moseneke's judgments in *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd*[16] and *Barkhuizen* have opened the door to a more caring, egalitarian, humane and ultimately more just contractual discourse.

This issue concludes with personal reflections written by inspirational colleagues that provide a picture of the man behind the outstanding jurist.

[13] 2002 (5) SA 721 (CC).
[14] 2007 (5) SA 323 (CC).
[15] See n 14 at para 104.
[16] 2012 (1) SA 256 (CC).

Coming from the pens of such distinguished judges as Kate O'Regan, MS Navsa and Albie Sachs, as well as academic and former constitutional clerk, Sindiso Mnisi Weeks, they provide penetrating personal insights into the jurist whose contribution to legal life this issue celebrates.

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